Against the Grain

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Legally Speaking — U.S. Libraries and the GDPR

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design elements are repeated and consistently applied. The U.S. Copyright Office Compendium states that typefaces are not eligible for copyright protection. This is not true in some European countries and Great Britain, however.

Fonts, by contrast, may be protected by copyright as long as the font qualifies as computer software or a program and meets the typical requirements for copyright. Commercially created fonts are typically available through license agreements and the terms of the license apply. Thus, in the United States, only the font software and not the artistic design of the typeface may be protected by copyright. A font based on handwriting would be protectable, but not typeface.

QUESTION: The manager of a campus bookstore asks about the recent fake textbook case.

ANSWER: On April 5, 2018, the federal district court for the Southern District of New York fined **Book Dog Books**, a textbook selling company, $34.2 million for selling fake textbooks. The court ruled in favor of the **Educational Publishers Enforcement Group** (comprised of **Cengage**, **Pearson Education**, **John Wiley**, and **McGraw-Hill Education**) and awarded damages for both trademark and copyright infringement. **Book Dog Books** is the parent company for a number of textbook selling companies. At issue were pirated copies and non-U.S. editions of textbooks. Litigation has been ongoing for a number of years. According to the publishers' attorney, "The jury in this case recognized the inherent value of textbooks and educational publishers, and that book distributors must exercise vigilance to avoid buying and selling counterfeit textbooks." **Book Dog Books** has announced that it will appeal. See ***John Wiley & Sons v. Book Dog Books***, S.D.N.Y., April 5, 2019, case 1:13-cv-00816-WHP-GWG.

QUESTION: A public librarian asks about the huge number of copyrighted works that will enter the public domain in 2019.

ANSWER: It is true that an enormous number of works will enter the public domain beginning on January 1, 2019, and each January thereafter. When the ***Copyright Act of 1976*** was passed, the term of copyright changed to life of the author and 50 years; in 1998, the ***Sonny Bono Copyright Extension Act*** increased it to life of the author plus 70 years. Works published between 1923 and 1963 originally received 28 years of protection. At the end of that period, they could be renewed for a second 28 years; if not so renewed, they passed into the public domain. The ***Copyright Act of 1976*** gave those renewed an additional 19 years of protection for a total of 75 years. The ***Sonny Bono Act*** also increased the maximum term of works published between 1923 and 1963 to a total of 95 years. On January 1, 2019, works published in 1923 that are still protected by copyright will have reached that 95 years of protection and will enter the public domain.

Legally Speaking — U.S. Libraries and the GDPR

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The news in the last few weeks (as well as your email inbox) seems to have been filled with references to the "***GDPR***." Why? Because this European Union law — the ***General Data Protection Regulation, (EU) 2016/679*** — went into effect on May 25, 2018, and can significantly affect not only European-based companies but also companies based outside the EU that do business in Europe. Okay, but what about U.S. libraries? The short (lawyerly) answer is that the ***GDPR*** may or may not apply to them.

The ***GDPR*** wrought a major change in the territorial scope of EU data protection law. Under Article 3 of the ***GDPR***, the Regulation applies *inter alia* to the "processing" of "personal data" of "data subjects" (i.e., individuals) who reside in the EU by a "controller or processor" that is not "established" in the EU, where the "processing activities" are related to:

> "(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the [European] Union; or
>
> "(b) the monitoring of their behaviour as far as their behaviour takes place within the [European] Union."

Thus, for example, a U.S. company is subject to the ***GDPR's*** provisions if it "processes" personal data of an individual residing in the EU when the data is accessed for the purpose of offering goods or services or of monitoring the individual's behavior in the EU. How does that fit with U.S. libraries? Let's walk through the analysis:

First, does your library collect "personal data"? Sure, you do. Every time a new borrower registers, you collect his or her name and contact information. That's personal data. Every time, he or she checks out a book, that information is recorded … and what people are reading is very personal data.

Second, does your library collect personal data relating to individuals who reside in the EU? Local public libraries probably don't, but university and research libraries almost surely have some borrowers that are EU residents: foreign-exchange students, visiting faculty, and their spouses and children.

Third — and this is the most thought-provoking part of the analysis — does your library "process" (let's just say "use") the personal data of the EU residents for the purpose of offering goods or services (either free or paid) to such individuals in the EU? (Or possibly in order to "monitor" their behavior in the EU?)[1] Ask yourself what possible activities a U.S. library might engage in that would involve offering the library's goods or service to an EU resident in the EU. Suppose that a U.S. library sent out an email announcement to all of its registered borrowers inviting them to a free presentation by a lecturer on a topic of current interest and suppose further that some of those emails went to email addresses of borrowers who had moved (back) to Europe. Technically, that hypothetical might fit the jurisdictional requirement of the ***GDPR***, but the library's email announcement hardly seems a likely target of the law. (Especially since the service, i.e., the lecture, is not being provided in the EU.)

Of course, if the hypothetical were changed to one in which the U.S. library regularly offered some sorts of goods or services that would be delivered in the EU, then a different conclusion would seem appropriate. In this circumstance — which may be far-fetched — the U.S. library would be well-advised to bring its data protection scheme into compliance with the ***GDPR***.

One simple step you can take to comply with the ***GDPR*** is for the library to obtain explicit consent from the data subjects (e.g., the individual borrowers) to use their personal data to email information about library programs including offers of goods or services. Library registration forms often include this sort of routine consent, but if not, it is easy enough to add it. (This is one reason you have recently been receiving notices of changes in Terms of Use agreements from vendors and others.)

There are other steps necessary for full compliance with the ***GDPR***, and those are somewhat more complicated. But these systemic changes may not be necessary, if your library does not engage in the data processing activities that would bring it within the jurisdictional parameters of the ***GDPR***.

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Endnotes

1. The preamble to the EU regulation explains "monitoring" behavior as follows: "whether natural persons are tracked on the Internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes."